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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner.*

v.

MRS. ELLA M. RAY, *Respondent.*

BRIEF OF PETITIONER.

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*.

v.

MRS. ELLA M. RAY, *Respondent*.

BRIEF OF PETITIONER.

I.

OPINIONS BELOW.

No written opinion was rendered by the District Court of the United States for the Eastern Division of the Eastern District of Arkansas; its formal judgment appears at Page 8 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 111 F. (2d) 695, and appears in the Record on Pages 13 to 16.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347(a)).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on May 13, 1940 (R. 17). The petition for writ of certiorari was filed on August 12, 1940. Motion to substitute A. F. Rawlings, present Receiver of the Lee County National Bank, as petitioner in place and stead of E. B. Futrall, former receiver, was filed on August 17, 1940, and was presented to and granted by the Court on October 7, 1940.

The order of this Court granting the writ of certiorari was issued October 14, 1940 (R. 18).

III.

STATEMENT OF FACTS.

The facts are not in controversy. On or about March 6, 1933, the Comptroller of the Currency declared the Lee County National Bank of Marianna, Arkansas, to be insolvent and thereupon closed the bank. On May 1, 1934, the Comptroller of the Currency appointed A. F. Callaway receiver of said bank and he was subsequently succeeded by said E. B. Futrall (R. 1). On July 6, 1934, the Comptroller of the Currency levied an assessment (R. 1-4) upon all of the stockholders of said bank, to be paid by them on or before August 13, 1934, equal in amount to fifty *per centum* of the par value ($100.) of each and every share of the capital stock of said association including an assessment against respondent, Ella M. Ray, in the amount of $1,333.33, said assessment being in the sum of $50.00 per share on 26⅔ shares of the capital stock of said bank. For reasons hereinafter indicated (*infra*, p. 3) enforcement of this first assessment has been abandoned and no questions concerning the same are presented here.

On November 6, 1935, the Comptroller levied a second assessment (R. 5) upon all of the shareholders of said bank to be paid on or before December 13, 1935, equal in amount to the first assessment, including an assessment against respondent in the amount of $1,333.33, and demanded payment thereon (R. 6, 7). Respondent failed to pay said assess-

ments, and suit was filed by the then receiver against respondent in the District Court of the United States for the Eastern District of Arkansas on December 7, 1938 (R. 1, 8), to enforce collection of the two aforesaid assessments (of 50 per centum par value, each), for the aggregate sum of $2,666.66, with interest at the rate of six *per cent per annum* on the sum of $1,333.33 from August 13, 1934, and interest at the rate of six *per cent* per annum on the sum of $1,333.33, from December 13, 1935, on the 26⅔ shares of the stock of said bank owned by respondent, Ella M. Ray.[1] Respondent filed her answer on March 15, 1939, (R. 8) admitting all the allegations of the complaint but pleading specifically the statute of limitations of the State of Arkansas as a complete bar to the right of the receiver to maintain said cause of action.

The receiver requested, in substance, (R. 9) that the trial court rule that the statute of limitations did not begin to run until *December 13, 1935*—the date of payment fixed by the Comptroller in the order levying the assessment.

The District Court in its conclusions of law, (R. 9-10), ruled that in as much as the complaint was not filed within three years from November 6, 1935, the date of the *levy* of the assessment, respondent's plea of the statute of limitations should be sustained and the complaint must be dismissed (R. 9, 10).

---

[1] When said suit was filed, the receiver relied upon *Armstrong* v. *McAdams* (C. C. A. 8th, 1931), 46 F. (2d) 931, as authority for the proposition that the five year statute of limitations of Arkansas was applicable. On March 6, 1939, which was subsequent to the institution of the suit in the instant case, but was prior to the District Court's ruling therein, the Arkansas Supreme Court handed down its opinion in *Vandover* v. *Lumber Underwriters et al.*, 126 S. W. (2d) 105, 110, holding that the three year statute of Arkansas applied to actions to enforce national bank stockholders' liability. The Eighth Circuit Court of Appeals thereupon, in *Futrall* v. *Branson* (June 20, 1939) 104 F. (2d) 409, in effect overruled *Armstrong* v. *McAdams, supra,* on the authority of *Vandover* v. *Lumber Underwriters et al., supra.* Hence, the receiver's action to enforce the first fifty *per centum* assessment was barred in any event and the appeal in the instant case was limited to the second fifty *per centum* assessment.

Formal judgment dismissing the bill of complaint was thereupon entered (R. 8-9).

On appeal the judgment of the District Court was affirmed. 111 F. (2d) 695 (R. 13, 16).

IV.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the Receiver's suit for collection of the second fifty *per centum* assessment accrued November 6, 1935, the date of levy of the assessment, and was barred by the Arkansas three year statute of limitations.

2. In failing to hold that said cause of action did not accrue until December 13, 1935, the date of payment fixed by the Comptroller of the Currency in the order levying the assessment, and that the cause of action was not barred by the Arkansas three year statute of limitations.

V.

THE QUESTION PRESENTED.

Was the Receiver's suit barred by the Arkansas three year statute of limitations, the suit having been filed more than three years from the date of the Comptroller's levy of the assessment, but less than three years from the date the assessment was payable?

VI.

STATUTES INVOLVED.

Sec. 5151 of the Revised Statutes, as amended by the Act of December 23, 1913, c. 6, Sec. 23, 38 Stat. 273, 12 U. S. C., Secs. 63 and 64; Act of June 30, 1876, c. 156, Sec. 1, 19 Stat. 63, 12 U. S. C., Sec. 191; Sec. 5234 of the Revised Statutes, 12 U. S. C., Sec. 192, creating personal liability of shareholders in national banks for the debts and obligations

of the bank and authorizing the Comptroller of the Currency, through duly appointed receivers, to enforce such liability. (Appendix, pp. 24-26.)

The Arkansas statute of limitations [Sec. 8928, Pope's Digest of Statutes of Arkansas, (1937); Crawford & Moses 1921 Digest of the Statutes of Arkansas, Sec. 6950] which provides:

> "The following actions shall be commenced within three years after the cause of action shall accrue, and not after:
>
> "First. All actions founded upon any contract or liability, expressed or implied, not in writing."

VII.

SUMMARY OF ARGUMENT.

The right to institute suit did not arise and consequently the cause of action did not accrue, prior to December 13, 1935,—the date fixed by the Comptroller of the Currency for payment of the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against Respondent was not barred by the Arkansas three year statute of limitations.

(1) *The nature of the assessment liability, and the determination of the maturity or accrual of the cause of action thereon, are questions of substantive law originating in the Federal statutes creating the assessment liability. The interpretation and construction of such statutes are governed by the decisions of the Federal courts.*

(2) *The decisions of the Federal courts have established the general doctrine that Statutes of Limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued.*

(3) *The order of the Comptroller of the Currency levying the assessment, and the demand upon respondent for payment of the assessment, unmistakably indicate that the right to institute suit to enforce collection of the assess-*

ment did not arise, and the cause of action against respondent did not accrue, until after the expiration of December 13, 1935,—the date fixed by the Comptroller of the Currency in said order for payment of the assessment. Hence, the Arkansas statute of limitations did not start to run until after the expiration of said date.

(4) *Four other Circuit Courts of Appeal and several United States District Courts have squarely decided the question of whether the cause of action accrued on the assessment date or on the payable date and in each instance the Court has held that the cause of action accrued from the date fixed by the Comptroller for payment of the assessment as distinguished from the date the assessment was levied.*

(5) *The ruling of the Circuit Court of Appeals for the Eighth Circuit in the instant case that the Arkansas three year statute of limitations commenced to run from the date of the assessment order rather than from the payable date thereof appears to be in conflict with the weight of authority as outlined in Point 4, supra (p. 19).*

VIII.

ARGUMENT.

The right to institute suit did not arise and consequently the cause of action did not accrue, prior to December 13, 1935,—the date fixed by the Comptroller of the Currency for payment of the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against Respondent was not barred by the Arkansas three year statute of limitations.

(1) *The nature of the assessment liability, and the determination of the maturity or accrual of the cause of action thereon, are questions of substantive law originating in the Federal statutes creating the assessment liability. The interpretation and construction of such statutes are governed by the decisions of the Federal courts.*

The precise issue involved in the instant case, and the position thereon of the court below, is succinctly set forth by that court in the following extracts from its opinion (R. 13, 14):

> "An extended statement of facts would seem to be unnecessary because it is admitted that the only question involved is whether the Statute of Limitations began to run from November 6, 1935, the date the assessment was levied, or whether it did not begin to run until December 13, 1935, the date fixed by the Comptroller in his order for the payment of the assessment. *There is no controversy about the applicable statute. Futrall* v. *Branson,* 8 Cir., 104 F. 2d 409.
>
> * * * * * * * * * *
>
> "It is the contention of plaintiff that the cause of action which came into existence with the entry of this order of assessment did not accrue until December 13, 1935, the date named by the Comptroller as the time for payment of the assessment. *It is conceded that if the statute did not begin to run until December 13, 1935, then the action was not barred, but that if it began to run on November 6, 1935, the date of making the assessment, then it was barred.* The Statute of Limitations began to run from the time the cause of action accrued, and this, we think, was the date on which the assessment was made. Pufahl v. Estate of Parks, 299 U. S. 217; Armstrong v. McAdams, 8 Cir., 46 F. 2d 931; Coffey v. Fisher, 6 Cir., 100 F. 2d 51." (Italics inserted.)

The applicable Arkansas statute of limitations referred to in the foregoing quotation provides:

> "The following actions shall be commenced within three years *after* the cause of action *shall accrue,* and not after:
>
> "First. All actions founded upon any contract or liability, expressed or implied, not in writing." (*supra,* p. 5. Italics inserted.)

Conceding for discussion that, after the cause of action has accrued, the local or Arkansas statute of limitations

is thereafter controlling as to the time within which suit must be filed, nevertheless it would seem clear that inasmuch as the assessment liability, and the right of the receiver to enforce the same, was, as a matter of substantive law, created by, and founded upon, the Federal statutes (*supra*, p. 5; app. pp. 24-26), the nature of said liability, and the determination of the maturity or accrual of the cause of action thereon, present questions involving the interpretation and construction of Federal statutes and the policies predicated thereon. *Seabury, Receiver* v. *Green,* (1935) 294 U. S. 165, 168; *Forrest* v. *Jack,* (1935) 294 U. S. 158, 162; *Rankin* v. *Barton,* (1905) 199 U. S. 228, 232. These questions must be governed by the Federal decisions. *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, 78; *Board of County Commissioners* v. *United States,* (1939) 308 U. S. 343, 349; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Downey* v. *City of Yonkers,* (S. D. N. Y. 1938) 23 F. Supp. 1018, 1023; affirmed (C. C. A. 2d, 1939) 106 F. (2d) 69, and (April 22, 1940) 309 U. S. 590.

(2) *The decisions of the Federal courts have established the general doctrine that Statutes of Limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued.*

The foregoing statement seems to be settled law, as indicated by: *United States* v. *Wurts,* (1938) 303 U. S. 414; *Borer* v. *Chapman,* (1887) 119 U. S. 587, 602; *Scovill* v. *Thayer,* (1881) 105 U. S. 143, 159; *Clark* v. *Iowa City,* (1874) 87 U. S. 583, 589; *Amy* v. *Dubuque,* (1878) 98 U. S. 470, 476.

The recent case of *United States* v. *Wurts,* (1938) 303 U. S. 414, 418, applies by analogy to the instant case. That case dealt with the question of when the right of the United States to recover an erroneous tax refund, accrued. The applicable Federal statute of limitations required suit to be brought "within two years after the making of such refund" and the question presented was whether the two year

limitation began when the refund was officially allowed, or when it was actually paid. In disposing of the question this Court said:

> "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government *had no right to sue this taxpayer* to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made." (Italics inserted.)

The Federal decisions relating specifically to the question of accrual of the cause of action upon assessment liability of shareholders of national banks, is discussed herein at pages 19 to 22.

General Doctrine,—Arkansas Decisions.

While, as above indicated, it is our position that the Federal decisions are controlling upon the issues here involved, it may be noted that the decisions of the State of Arkansas are in full accord with the doctrines established by the Federal cases above cited, and are to the effect that the general rule is that the cause of action does not accrue, and the statute of limitations does not begin to run, until the right to file suit to enforce the cause of action has matured and is available. *Holloway* v. *Morris,* (1931) 182 Ark. 1096, 34 S. W. (2d) 750; *Smith* v. *Milam,* (1937) 195 Ark. 157, 110 S. W. (2d) 1062; *Holland* v. *Clark,* (1878) 32 Ark. 697; *Heise* v. *Bumpass,* (1883) 40 Ark. 545. *Louisville Silo & Tank Co.* v. *Thweatt,* (1927) 174 Ark. 437, 295 S. W. 710; *Cairo & Fulton R. R. Co.* v. *Parks,* (1877) 32 Ark. 131, 152; *Denton's Ex'rs.* v. *Embury & Young,* (1849) 10 Ark. 228, 232.

In suits for recovery of money obligations the Supreme Court of Arkansas has looked to the payment date. In *Sturdivant* v. *McCorley,* (1907) 83 Ark. 278, 281, 103 S. W.

732, the court said: *"As no time was set for the payment,* the debt was in law payable on demand." (Reporter Citation. Italics inserted.) Also see *Kempner* v. *Gans,* (1908) 87 Ark. 221, 228, 111 S. W. 1123.

(3) *The order of the Comptroller of the Currency levying the assessment, and the demand upon respondent for payment of the assessment, unmistakably indicate that the right to institute suit to enforce collection of the assessment did not arise, and the cause of action against respondent did not accrue, until after the expiration of December 13, 1935,—the date fixed by the Comptroller of the Currency in said order for payment of the assessment. Hence, the Arkansas statute of limitations did not start to run until after the expiration of said date.*

The order of the Comptroller of the Currency of November 6, 1935, levying the assessment upon the shareholders of the national bank involved in the instant case appears in the Record at pages 6-7, but for convenience of discussion the same is here repeated:

"November 6, 1935.

"No. 10854

"In the Matter of The Lee County National Bank of Marianna, Arkansas

"To All Whom It May Concern:

"Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of 'The Lee County National Bank Of Marianna,' Arkansas, and upon a valuation of the uncollected assets remaining in his hands on the Twenty-first day of June, 1934, it appeared to the satisfaction of the Comptroller of the Currency that in order to pay the debts of such association it would be necessary, to enforce the individual liability of the stockholders thereof to the extent of Forty Thousand Dollars, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Sec-

tion 23, Act approved December 23, 1913, known as the Federal Reserve Act.

"And Whereas, upon a further accounting by the Receiver, it appears to my satisfaction that the sum of Forty Thousand Dollars was inadequate, and that, in order to pay the debts of said association it is necessary to further enforce the individual liability of the stockholders to the extent hereinafter mentioned, as provided by said Sections 5151 and 5234 of the Revised Statutes of the United States; Section 1c, 156, Act of June 30, 1876, and Section 23, Act Approved December 23, 1913, known as the Federal Reserve Act.

"Now, Therefore, by virtue of the authority vested in me by law, I do hereby make a further assessment and requisition upon the shareholders of the said The Lee County National Bank Of Marianna, for Forty Thousand Dollars, *to be paid by them ratably on or before the Thirteenth day of December, 1935, and I hereby make demand upon each and every one of them* for an additional fifty per cent of the par value of each and every share of the capital stock of said association owned by them, respectively, at the time of its failure; and I hereby direct A. F. Callaway, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

"In Witness Whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Sixth day of November, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal)" (Italics inserted)

In pursuance of the directions to the receiver contained in the foregoing order, the receiver, as of November 6, 1935, notified respondent (R. 5-6) that the Comptroller had levied the assessment under date of November 6, 1935, and that the same was "payable at the office of the Receiver, on or before December 13, 1935" and that deferred payments would "bear interest after December 13, 1935 at the legal rate in the State of Arkansas * * *", provision being made for abatement of such interest where installments of the

assessment were paid on and after December 13, 1935 in accordance with the schedule specified in the notice. Said notice, as thus given to respondent, provided in the last paragraph thereof:

> "You are therefore required to pay the assessment on the 26⅔ shares of stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its liquidation.
>
> "A. F. Callaway, Receiver, The Lee County National Bank of Marianna, Arkansas.
>
> "To Ella M. Ray, 515 N. McClain, Memphis, Tennessee."

The above quoted order of the Comptroller of the Currency levying the assessment on a given date, but fixing the time of payment thereof at a future date therein specified, is in accord with the policy and practice to the same effect which has been followed by the Office of the Comptroller of the Currency since 1888. In this connection, there is set forth in the appendix hereof at page 26, a true copy of an order of the Comptroller of the Currency dated July 25, 1888 levying an assessment against the shareholders of the Commercial National Bank of Dubuque, Iowa, and fixing August 25, 1888 as the date of payment of said assessment.

In *Strasburger* v. *Schram,* 68 App. D. C. 87; 93 F. (2d) 246, the United States Court of Appeals for the District of Columbia had under consideration the precise type of question involved in the instant case. Schram, the receiver of First National Bank-Detroit sued Strasburger, as a shareholder of the bank, to recover upon an assessment liability, under an order of the Comptroller of the Currency of May 16, 1933 levying an assessment against the shareholders and fixing June 23, 1933 as the date for payment thereof. Thereafter the time for payment was extended by amendment of the assessment order, to July 31, 1933. The shareholder, Strasburger, was sued in the District of Columbia on July

22, 1936. The applicable statute of limitations for the District of Columbia provided that no action could be brought "after three years from the time when the right to maintain such action shall have accrued." The defendant, by appropriate motion, contended that the statute of limitations began to run from and after the 16th of May, 1933, and that the cause of action upon the assessment expired May 16, 1936. The receiver contended that the three year period started to run from and after July 31, 1933, the date last fixed by the Comptroller of the Currency for payment of the assessment and that inasmuch as suit had been filed on July 22, 1936 the time permitted by the three year statute had not expired.

The Court of Appeals held that the statute of limitations began to run from and after the fixed date of payment of the assessment. It will be observed from the following quotation from the opinion that the court commented, with approval, upon the long-standing practice of the Comptroller of the Currency in fixing a future date for the payment of a levied assessment and expressed its view that a receiver could not commence an action against a shareholder until after the date of payment so fixed, and accordingly that the cause of action upon the assessment liability did not accrue until after said date of payment. (Page 248.)

> "We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is

not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court. This was the view expressed by Judge Sanborn in the case of Deweese v. Smith (C. C. A.) 106 F. 438, 441, 66 L. R. A. 971. There he said: 'The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees.'

"Other cases expressing the same view are Rankin v. Miller (D. C.) 207 F. 602, King v. Pomeroy, (C. C. A.) 121 F. 287, and Hall v. Ballard (C. C. A.) 90 F. 2d. 939, 944. In the Rankin Case it was said that the period of limitation will commence to run only from the time the cause of action is fully matured through the making of an assessment and the arrival of the day when it becomes payable. In the King Case the assessment order was dated February 12th and was payable 60 days after that date, and there the court said that the cause of action accrued 60 days after February 12th and not before.

* * * * * * * * * *

"The view expressed in each of these cases seems to us reasonable and, as we think, is supported not only by what was said by the Supreme Court in McDonald v. Thompson, supra, but also by what was said in Bernheimer v. Converse, 206 U. S. 516, 534, 27 S. Ct. 755, 761, 51 L. Ed. 1163. That was an equity case in which the court ordered an assessment against the shareholders of a Minnesota corporation. The order required each shareholder to pay the amount of the assessment to the receiver within 30 days after the date of the order, and on the suggestion that the cause was barred by the statute of limitations the court said: 'The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota court.' "

The assessment order involved in the foregoing case of *Strasburger* v. *Schram*, presented, factually, somewhat

more complicated issues than the assessment order involved in the instant case in that, as above indicated, the assessment order in the Detroit bank had been amended several times so as to extend the date of payment in view of certain facts affecting the situation. Notwithstanding this, the United States Court of Appeals for the Sixth Circuit in the case of *Barbour* v. *Thomas,* (1936) 86 F. (2d) 510, cert. denied 300 U. S. 670, in commenting upon the enforcibility of the said Detroit bank assessment by the receiver said:

> "he could not commence an action before July 31, 1933, since the assessments were not due until that date." (Opinion p. 514.)

The *Barbour* v. *Thomas* case did not involve the issue present in the instant case, but it did concern seasonable action on the part of the receiver in prosecuting the assessment liability, and the foregoing comment by the court was made in that connection.

It appears to have been the practice in the Office of the Comptroller of the Currency prior to 1888 to make the assessment payable from the date of the order levying the assessment, as indicated by *Casey* v. *Galli,* (1876) 94 U. S. 673, 677 and *Bowden* v. *Johnson,* (1882) 107 U. S. 251, 263. The contrast between the two practices existing prior to, and after, 1888, with reference to the date of payment of the assessment, is commented upon in *Davis' Estate et al.* v. *Watkins,* (1898) 56 Neb. 288, 76 N. W. 575, where the court said at page 576 (of the reporter citation):

> "But the assessment made by the comptroller was payable on or before the 12th day of August, 1893, and we think that it drew interest from that date. In Casey v. Galli, 94 U. S. 673, it was held that the assessment drew interest from the date it was made; and the same ruling was made in Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246. In each of those cases it appears that the assessment was payable on the date it was made. Here the assessment was payable 30 days after it was made, and, within the principle of the cases cited, would draw interest from the time it was payable."

It seems clear, in the light of the Federal court decisions construing the authority of the Comptroller of the Currency conferred by the National Banking Laws relating to assessment liability, that it is left entirely to the discretion of the Comptroller, in the exercise of the quasi judicial powers vested in him, to determine if and when an assessment shall be levied, and when payment thereof must be made. The doctrine in this respect was broadly stated in *Kennedy* v. *Gibson* (1869), 8 Wall. 498, at page 505 of the opinion:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

In *Korbly* v. *Springfield Institution for Savings, et al.*, (1917) 245 U. S. 330, this court upheld the power of the Comptroller of the Currency to withdraw an assessment before it was paid, and, upon a subsequent determination of the necessity therefor, to levy a second assessment. In commenting upon the discretionary power thus exercised, this court said, at page 333, of its opinion:

> "From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its pro-

visions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker* v. *Perry*, 184 U. S. 258; *Kennedy* v. *Gibson*, 8 Wall. 498; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; and *Bowden* v. *Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. *A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used.* The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. * * * We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions." (Italics supplied.)

Conceding that the Comptroller may levy an assessment and make it payable forthwith and thus subject the shareholder to immediate suit for collection of the assessment, certainly it seems logically to follow that the Comptroller, instead of making the assessment payable immediately, can make it payable at a designated future date. The portion of the Comptroller's order levying the assessment and causing the shareholders' contingent liability to become absolute, is necessarily qualified by that portion of the same order which fixes a future date for the payment of the assessment, such latter provision thereby having the effect of delineating the enforcibility of the liability thus created. The cause of action thus based upon the assessment, cannot, under the qualification fixing the future date of payment, become matured or accrued until the date of payment thus fixed, and the right to institute suit cannot arise until there has been default in payment on the date

fixed for payment by the assessment order. The situation of the shareholder, under such order, is analogous to that of a debtor on a promissory note payable at a future date. His obligation exists from the date of execution of the note and it is, of course, an absolute obligation, but he cannot be sued upon the note until it becomes due and he becomes in default.

In *Rankin* v. *Miller et al.*, (Del. 1913) 207 Fed. 602, 610, it became necessary to determine the date of maturity of the assessment liability of a shareholder of a national bank from the standpoint of the running of the Statute of Limitations. The language in the opinion passing upon this point seems to be particularly helpful.

> "But the period of limitation will commence to run only from the time the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. * * * The second assessment for the collection of which this suit was brought was made November 22, 1900, and became payable December 22, 1900, a period of only one year, four months and eight days before the filing of the bill. It is thus clear that this suit is not directly or indirectly barred by any provision of the general statutes of limitation of Delaware. There is a broad distinction between the maturing of a liability as a prerequisite to the successful prosecution of an action for its enforcement, and the attaching of the liability upon the declaration of insolvency or the acquisition of the stock."

Bernheimer v. *Converse* (1907) 206 U. S. 516, applies by analogy to the instant case. The court had ordered an assessment against the shareholders of a Minnesota manufacturing corporation and directed that the amount thereof be paid to the court receiver within 30 days after the date of the order. The case was carried to this court, and in connection with the question of the running of the Statute of Limitations, this court stated, at page 534,

> "The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder

had failed to pay, as required by the order of the Minnesota Court of December 22, 1902."

Also see:

McDonald v. *Thompson,* (1902) 184 U. S. 71;
McClaine v. *Rankin,* (1905) 197 U. S. 154, 158;
Deweese v. *Smith,* (1901) 106 Fed. 438, 441; affirmed, per curiam (1902) 187 U. S. 637;
King v. *Pomeroy,* (C. C. A. 8, 1903) 121 Fed. 287, 297;
Hall v. *Ballard,* (C. C. A. 4, 1937) 90 F. (2d) 939.

(4) *Four other Circuit Courts of Appeal and several United States District Courts have squarely decided the question of whether the cause of action accrued on the assessment date or on the payable date and in each instance the Court has held that the cause of action accrued from the date fixed by the Comptroller for payment of the assessment as distinguished from the date the assessment was levied.*

The cases in the four other circuit courts of appeal are:

Strasburger v. *Schram* (App. D. C. 1937) 93 F. (2d) 246, 248; *supra,* page 12.
Reich v. *Van Dyke* (C. C. A. 3, 1939) 107 F. (2d) 682.
Haight, Receiver of the Salt Springs National Bank of Syracuse, N. Y. v. *First Trust and Deposit Company,* (C. C. A. 2d, 1940) 112 F. (2d) 572.
McPherson v. *Schram* (C. C. A. 5, 1940) 112 F. (2d) 674.

The cases in the United States District Courts, are:

Hardesty v. *Corrothers, et al.* (N. D. W. Va. 1940) 31 F. Supp. 365.
Culhane v. *Smith* (N. D. Ill., 1937) 19 F. Supp. 226.

In addition may be noted the following State court decisions:

Meeker v. *Oramam Realty Corporation* (App. Div. N. Y. Sup. Ct. 1938) 2 N. Y. S. (2d) 574, 575, affirmed by the New York Court of Appeals (1939) 281 N. Y. 868, 24 N. E. (2d) 502.

Howell v. *Fogg* (C. C. N. J., Cape May County, 1939) 7 Atl. (2d) 282.

(5) *The ruling of the Circuit Court of Appeals for the Eighth Circuit in the instant case that the Arkansas three year statute of limitations commenced to run from the date of the assessment order rather than from the payable date thereof appears to be in conflict with the weight of authority as outlined in Point 4, supra (p. 19).*

The court below relied upon *Pufahl* v. *Estate of Elvira J. Parks, Deceased.* (1936) 299 U. S. 217, involving a claim for assessment against the estate of a deceased stockholder and an attempt to subject undistributed inventoried assets in the hands of the executors to its payment, said claim having been filed after the expiration of the one year period provided by Illinois law. The court below in the instant case appears to have rested its decision on language quoted from the *Pufahl* case and italicized this sentence as the basis of its conclusion (R. 15):

> "From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder, or the executor of a deceased stockholder."

The case did not involve the issue presented in the instant case concerning the distinction between the date of the assessment order and the date of payment of the assessment thereunder, and the language quoted in the opinion (R. 15) must be considered as dictum insofar as any supposed application to the instant case may be concerned. The purpose of this court in the *Pufahl* case in using the language above quoted, appears to have been only to indicate that the contingent assessment obligation of the shareholder became an absolute liability upon entry of the Comptroller's order for assessment. The statement that "From the moment of the Comptroller's order for assessment the bank's receiver" had a claim which would support an action of debt at common law does not seem, under the facts

and issues in the case, to have been intended to indicate that suit to enforce collection of an assessment could be filed at the moment of entry of the Comptroller's order for assessment, as distinguished from the date fixed for payment of the claim.

The court below also relied upon *Coffey* v. *Fisher*, (C. C. A. 6, 1938) 100 F. (2d) 51, to support its conclusion. There, the receiver's suit to enforce the statutory liability of the estate of a deceased stockholder raised the question of the applicable provisions of the Tennessee statute of limitations. The stockholder died on August 1, 1933, and was the owner of 500 shares of national bank stock, and the executor of his estate qualified on August 19, 1933. The Comptroller of the Currency levied an assessment against the shareholders of the bank on April 19, 1934, and by various extension dates the time for payment thereof was extended to April 15, 1935. The suit was filed on June 29, 1936. The executor contended that the action was barred by Section 8225 of the Tennessee Code of 1932, which provides that the period allowable before bar to suits by creditors of deceased persons is six months from the date the cause of action thereon accrues. Plaintiff-receiver contended that he was not a creditor of the deceased; and that because the assessment was not levied until after the death of the stockholder his claim was against the personal representative, and was governed by Section 8608 of said Code, which permits the cause of action to be commenced within eighteen months from the time it accrues.

The Court was of opinion that Section 8225 applied and that the suit was barred, no matter whether the cause accrued on the assessment levy date or on the last extension date for payment. However, because plaintiff-receiver insisted that he had eighteen months from April 15, 1935, within which to bring suit, the Court entered into a discussion of receiver's contention. The Court expressed the opinion that the receiver's right to sue existed as of the date of the levy of the assessment, notwithstanding the fact

that the assessment order provided for future dates of payment of the assessment, but held that even upon the receiver's contention his suit was barred. Such an assumption seems obvious error in that such doctrine nullifies that portion of an assessment order which fixes the future date of payment and thereby renders the stockholder subject to immediate suit notwithstanding the Comptroller provides that he is not required to pay before the specified future date. Inasmuch as Section 8225 had been applied by the court as a bar to the action, petitioner submits that the aforesaid portion of the court's opinion relating to the accrual date of the right to sue is no more than dictum in so far as the question here presented is concerned.

The court below makes a statement in its opinion (R. 14) that the case of *Armstrong* v. *McAdams* (C. C. A. 8, 1931) 46 F. (2d) 931, (therein cited) presented the identical question involved in the instant case. It is respectfully submitted that upon examination of the case it will be ascertained that the court was mistaken in this regard and that the issue presented in the instant case was not involved in that case. The case does involve the question of whether, under Arkansas law, the three year Statute of Limitations or the five year Statute of Limitations applied to the particular case, as explained more fully at footnote 1, *supra,* page 3.

The cases of: *Donald* v. *Bird* (C. C. A. 9, 1936) 85 F. (2d) 663; *Drain* v. *Stough* (C. C. A. 9, 1932) 61 F. (2d) 668; *Rankin* v. *Barton* (1905) 199 U. S. 228—relied upon by the court below (R. 16) appear to have no application to the issues of the instant case. They make no mention of a date for payment of the assessment and as a matter of fact the date for payment would have been wholly immaterial to the questions at issue in any of the three cases.

In *Johnson* v. *Greene,* (C. C. A. 9, 1937) 88 F. (2d) 683 (R. 16) cited by the court below, a California Statute of Limitations provided that the statute should run from the date the assessment liability was "created". The decision

properly held that the date of payment was immaterial under the statute. It is obvious the decision has no application to the issues of the instant case.

IX.

CONCLUSION.

In view of the foregoing discussion it is considered that the decision of the court below should be reversed.

Respectfully submitted,

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency,
Of Counsel.

APPENDIX.

U. S. C. Title 12, Sec. 63.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. Sec. 5151; Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 64:

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the

subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, Sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such associa-

tion ,on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

TREASURY DEPARTMENT

Office of the Comptroller of the Currency
Washington, July 25th, 1888

In the matter of
"The Commercial National Bank
of Dubuque." Iowa

To All Whom It May Concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The Commercial National Bank of Dubuque," Iowa, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States:

Now, Therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Commercial National Bank for One hundred thousand dollars to be paid by them ratably on or before the twenty fifth day of August, 1888; and I hereby make demand upon each and every one of them for One hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively, at the time of its falure; and I hereby direct E. P. Welles, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to en-

fore to that extent the said individual liability of the said shareholders.

In Witness Whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia this twenty fifth day of July, A. D. 1888.

SEAL

J. D. ABRAHAMS,
Deputy and Acting Comptroller of Currency.